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No. _____

In The

Supreme Court of the United States

October Term, 1994

SYED WAHIDUL ISLAM and
MAHABUB ALAM BHUIYAN,

Petitioners,

v.

CREATIVE TOURS MICRONESIA, INC.,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an employer has a duty to inquire whether an employee has a driver's license where the employer knows the employee will be driving company vehicles and will have 24-hour access to them.

Whether the circuit court majority erred in reversing the district court's finding of fact that an employer was negligent in entrusting its vehicles to an employee who had no driver's license for failing to ascertain his fitness to drive where the employee was an alien hired illegally, he never indicated that he was licensed, he indicated no job experience involving driving, had no car, and had caused one accident that resulted in a lawsuit that was pending when he was hired.

Whether the circuit court erred in basing its decision on the conclusion that plaintiffs pled a theory of negligent entrustment as distinguished from negligent hiring, where the complaint alleged an employer-employee relationship, that fact was uncontroverted, part of the findings of fact, and was part of the district court's conclusion that there was culpable negligence.

LIST OF PARTIES

The caption of the case in this court contains the name of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

Pursuant to Rule 29.1, the following entities are related to Creative Tours Micronesia, Inc., as parent corporations: (1) Pacific Creative Services, Inc., a Hawaii Corporation, and (2) Jalpak Co., Ltd., a Japan Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on September 2, 1994 (Cir. Ct. No. 92-16684).

OPINIONS BELOW

The September 2, 1994 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is Case Number 92-16684, dated September 2,

1994, which decision is unpublished. It is reprinted in the appendix to this Petition. (App. 1-8).

The prior judgment after bench trial of the United States District Court for the Northern Mariana Islands, entered on August 25, 1992, in Civil Number 91-0024, was not published. It is reprinted in the Appendix. (App. 19-20).

STATEMENT OF JURISDICTION

The memorandum decision of the Court of Appeals was filed on September 2, 1994. A petition for rehearing and suggestion of rehearing en banc was timely filed. By order of February 23, 1995 the motion was denied. A copy of that order is reprinted in the appendix. (App. 21). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Review is warranted because a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and has decided a federal question in a way that conflicts with applicable decisions of this Court. Rule 10.1(a) and (c), Supreme Court Rules of the United States.

STATUTORY PROVISIONS INVOLVED

The Commonwealth Code provides as follows:

> Absent CNMI statute, CNMI case law, or local customary law, the rules of the common law as

expressed in the restatements of the law approved by the American Law Institute are the rules of decision when applying CNMI law. 7 CMC §3401 (1984).

The Restatement (Second) of Torts (1965) provides:

Section 308. *Permitting Improper Person to Do Things or Engage in Activities.*

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390. *Chattel for Use by Person Known to be Incompetent.*

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

STATEMENT OF THE CASE

Overview.

This case arises form a single car accident occurring on March 15, 1991 on the island of Saipan in the Commonwealth of the Northern Mariana Islands. Defendant's

employee (referred to as "Ronnie"), who did not have a driver's license, was driving one of defendant's cars while off duty. With plaintiffs as passengers, he operated the car so negligently that he lost control and drove off the road, colliding with parked cars and severely injuring plaintiffs.

The case proceeded to trial on a theory of negligent entrustment. Trial was before the district court judge sitting without a jury. After two days of trial, the court found for plaintiffs, entering judgment and extensive findings and conclusions on August 25, 1992. Defendant appealed.

The Circuit Court of Appeals, in a two to one decision, reversed the district court on both: (1) its factual finding that defendant knew or should have known that Ronnie's operation of their vehicles involved an unreasonable risk of harm to others, and (2) on its legal conclusion that an employer has a duty to determine if an employee holds a driver's license when it knows the employee will have free and unsupervised access and will be driving company vehicles.

Jurisdiction of Lower Courts.

48 U.S.C. §1694a(a) gives the District Court of the Northern Mariana Islands jurisdiction equivalent to that of a District Court of the United States, including, but not limited to, diversity jurisdiction. Here, jurisdiction was based on diversity of alienage pursuant to 28 U.S.C. §1332(a)(2) and (d) in that plaintiffs are citizens of Bangladesh and defendant a corporation organized and existing under the laws of the Territory of Guam.

48 U.S.C. §1694(c) makes the rules of practice and procedure made effective by Congress or the Supreme Court of the United States applicable to the District Court of the Northern Mariana Islands and appeals therefrom, specifically including Title 28, United States Code. Thus, 28 U.S.C. §1291 and §1294(4), construed with 48 U.S.C. §1694c(b), gave the Court of Appeals for the Ninth Circuit jurisdiction.

The Material Facts[1]

Plaintiff's are two citizens of Bangladesh who entered the Commonwealth pursuant to the CNMI's unique alien labor laws.[2] (Finding No. 1). Defendant is a Guam Corporation doing business in the territory of Guam and in the CNMI on the island of Saipan, in the business of conducting tour groups from Japan to Guam and Saipan. (Finding No. 2).

Creative Tours had some vehicles that were used by its personnel for their transportation to and from hotels

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[1] The facts herein related are taken mainly from the Findings of Fact entered by the District Court, reprinted in the appendix at pages 9-18. To the extent those facts are supplemented, references are to the reporter's transcript, designated RT and page and line number(s).

[2] 3 CMC §4411 et seq. The laws of the United States relating to immigration and naturalization have only limited application to the Commonwealth, thus authorizing the CNMI to regulate the entry and employment of aliens within the Commonwealth. Sec. 503(a), Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, P.L. 94-241, 90 Stat. 263 (March 24, 1976), reprinted as amended in 48 U.S.C.S. §1681 note (L.Ed. 1995).

and the airport. The vehicles included a 1990 White Toyota Corolla leased by and under the control of Creative Tours. (Finding No. 3). Although the company policy was that the company's vehicles were only to be used for business purposes, the vehicles and their keys were available to its employees at all hours of the day and night without any system of checking them out or record-keeping. (Finding No. 4)

On January 8, 1991, Creative Tours hired Mohammed Nazul Islim, known as "Ronnie", to be part of their airport division, to assist members of tour groups with check-ins and baggage at the airport and hotels. (Finding No. 5). Like plaintiffs, Ronnie was also a citizen of Bangladesh. (RT 11:13-14). Creative Tours knowingly hired Ronnie illegally – that is, without going through the steps required by the CNMI law for issuance of an alien work permit. (RT 11:15-12:25). Because of this, Ronnie's qualifications and experience for the job were never documented, as they otherwise would have been if the law had been followed.[3]

Although the general manager who hired Ronnie explained to him that he would be required to operate a motor vehicle in performing the job, neither he, nor anyone else at Creative Tours, asked or otherwise determined if Ronnie had a driver's license. (Findings 8, 9). Nor did they ask or otherwise determine anything about Ronnie's driving experience or qualifications. (Finding 12). Rather

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[3] Under the CNMI Non-resident Worker Law, at least two years experience in the job category the prospective worker is to fill is required to be documented by affidavit. 3 CMC §4434(b).

than asking, the manager simply assumed an employee would tell him if he was not licensed. (RT 213:7-12).

In fact, Ronnie was never issued a driver's license. (Finding 11). He had only limited driving experience before being hired by Creative Tours, having previously worked as a stevedore and security guard, neither of which required him to drive. (Finding 13). As to his driving experience, in August 1989, Ronnie took a car leased to a friend without his permission and got into a two-car collision in Saipan. That collision resulted in a lawsuit charging Ronnie with negligence, and wherein insurance coverage was denied because of Ronnie's not having a driver's license. That case was on file and pending in the U.S. District Court for the Northern Mariana Islands when Ronnie was hired by Creative Tours. (Finding 14).

On March 15, 1991, plaintiffs were at a birthday party which Ronnie also attended. (Findings 16, 17). After the party, Ronnie offered one of the plaintiffs a ride home in Creative Tours' Toyota Corolla, which Ronnie had used to come to the party. The two plaintiffs and three others got into the car and Ronnie drove. (Findings 18, 20). Once on the roadway, Ronnie began accelerating, passed two or three cars, made unsafe lane changes, drove faster than the speed limit and ignored a request by one of the plaintiffs to slow down. Eventually, he lost control and went off the road, hitting parked cars. (Finding 21).

Plaintiff Islam suffered a subluxation of the cervical spine which eventually required surgical fusion of the

C2-C3-C4 vertebral joints, resulting in a permanent disability. (Findings 26, 27). Plaintiff Bhuiyan suffered fractures in each clavicle and other injuries. (Finding 25).

ARGUMENT

I

Creative Tours Had a Duty to Ascertain Ronnie's Fitness to Drive its Cars

For two independent reasons Creative Tours was under a legal duty to check into Ronnie's qualifications to drive. First of all, the Commonwealth's rules of decision, as embodied in the Restatement, required it; and, secondly, if common law principles and considerations of policy are applied, the same result obtains. Applicable case law does not dictate a different result.

A. The Restatement.

Restatement (Second) of Torts, Section 308 imposes liability upon an actor who "knows or should know" that a third person permitted to use the actor's things or engage in activities under the actor's control will create an unreasonable risk of harm.

"The words 'should know' are used throughout the Restatement of this Subject to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such

fact exists." Rest. 2d, Torts, §12(2). The comment amplifies: " 'should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or nonexistence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty." Rest. 2d, Torts, §12(2), com. a. The Restatement is quite clear then, that when someone gives another a particular instrumentality or undertaking there is a duty to ascertain if he has a minimum level of competence for that activity, "or is one of a class generally recognized as being incompetent or likely to be so". Rest. 2d, Torts, §307, com. a. An unlicensed driver would be in such a class. Moreover, the restatement recognizes that the employer-employee relationship is a special one giving rise to a greater duty to ascertain fitness. *See*, Rest. 2d Torts, §307, com. b; §308, com. c.

The Restatement provided the rules of decision for the determination of CNMI law. 7 CMC §3401. Therefore, it was required to be applied in this diversity case. 28 U.S.C. §1652; *Erie RR v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). It was correctly applied by the district court, but these important aspects of it were ignored or overlooked by the circuit court majority.

B. Policy Considerations.

In negligence law, "it should be recognized that duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *First Ins. Co. of Hawaii, Ltd. v. International Harvestor Co.*, 659 P.2d 64, 67 (Haw. 1983) *quoting* W.

Prosser, *Handbook of Law of Torts* (4th ed. 1971) §53, pp. 325-26.

The court did not take policy into consideration at all. Yet it has been recognized that policy analysis is mandatory to determine whether duty exists. *See, Hayes v. Nagata,* 730 P.2d 914 (Haw. 1986) ("It is *incumbent* upon the court to weigh the considerations . . . "); *Isaacs v. Huntington Mem. Hosp.,* 695 P.2d 653, 658 (Cal. 1985) ("Several factors *must* be weighed . . . ") (Emphasis added).

The different factors to be weighed are pretty consistently recognized. *See,* e.g., *Thompson v. County of Alameda,* 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980); *Observatory Comp. v. Daly,* 780 P.2d 642 (Colo. 1989). The important considerations here are:

1. *Foreseeability of harm.* Failure to take precautions that drivers are competent to operate vehicles they are allowed to use creates a greater likelihood of auto accidents and a corresponding decrease in the level of safety to those of the general public using the roadways.

2. *Policy of preventing future harm.* Conversely, by requiring drivers to have the minimum level of competence a license represents, vehicle owners will minimize the likelihood of future accidents.

3. *Moral blame.* Creative Tours' disregard of any safety measures or practices should be discouraged and is worthy of sanction.

4. *Insurance availability.* It is common in the CNMI for auto liability insurance policies to exclude non-licensed drivers. Therefore, even if they are driving

insured vehicles, the greater presence of unlicensed drivers means more accident victims will go uncompensated.

5. *Burden and social utility of defendant's conduct.* The burden on an employer to determine whether its potential drivers are licensed is practically nil. In addition, there is no utility in encouraging employers to remain ignorant of their employees' qualifications.

If left to stand, this decision will encourage employers to remain ignorant of employee qualifications. Such a policy is particularly poor for the CNMI, where about 40 percent of the population are alien workers and many, like Ronnie, overstay their work permit, work illegally, without a permit and outside the job category approved for them by the CNMI Division of Labor. Logically, more unlicensed drivers whose fitness is untested may be expected on the roads and more accidents will occur.

The Commonwealth requires vehicle operators to be licensed for good reason. It has been noted that a "very substantial interest in highway safety compels the licensing of motor vehicle operators." *First Insurance v. International Harvestor, supra* at 68.

"Numerous courts have determined that entrusting a car to an unlicensed driver is tantamount to entrusting a car to an incompetent driver, and therefore an independent act of negligence." *Seward v. Griffin,* 452 N.E.2d 558, 563 (Ill. App. 1983) (citations omitted). In other courts the fact that the driver was unlicensed makes for a prima facie case of negligent entrustment. *Owens v. Carmichael's U-Drive Autos,* 116 Cal. App. 348, 2 P.2d 580 (1931).

C. Case Law

1. Yoo v. Ouitugua

After oral argument, while the appeal was under submission, the Supreme Court of the Commonwealth of the Northern Mariana Islands handed down its decision in *Yoo v. Ouitugua* (Appeal No. 92-001, May 12, 1994). (App. 25). That case represents the only Commonwealth precedent concerning negligent entrustment. In it the CNMI Supreme Court affirmed liability where the driver was unlicensed, but was also underage and ineligible for a license, which his mother, the owner, knew.

While the circuit court majority purports to follow *Yoo*, in fact it did not. Rather, the majority merely refers to a single sentence in the *Yoo* opinion which paraphrases section 390 of the Restatement of Torts. Ignored is the much more pertinent discussion about the requirements, the purpose and the importance of licensing. (App. 30-31). Also ignored is this language: "Because an automobile is a dangerous instrumentality in the hands of inexperienced, youthful and unqualified drivers, such traffic laws are necessary for the safety of the public and must be strictly enforced." *Yoo* at 6. (App. 30). Thus, the *Yoo* decision imparts two important points: (1) the CNMI driver's licensing statutes are not merely regulatory and revenue-raising, but are for the purpose of determining driver fitness and preventing unsafe drivers from using the commonwealth's roads; and (2) an automobile can be a dangerous instrumentality. The first point indicates that failure to have, or to require an entrustee to have, a

license creates an unreasonable risk of harm. The recognition that an automobile may be a dangerous instrumentality means that the degree or standard of care which an owner or operator is required to exercise is elevated. *McNear v. Pacific Greyhound Lines*, 146 P.2d 34 (Cal. App. 1944). Thus, *Yoo* indicates that the licensing of drivers is so important that one who has a special relationship of control such as a parent to his child or a master to his servant, must require that the operator have a license before entrusting a car to him.

2. Other Case Law.

In the decision the majority criticizes the dissent for citing no authority that an entrustor has any different duties where it is the employer of the entrustee. (p. 4; App. 4). But such authority does exist. Most notable is a decision from another circuit, *Crockett v. United States*, 116 F.2d 646 (4th Cir. 1940), *cert. denied*, 314 U.S. 619 (1941), in which the court held that "[i]t was the duty of [employer] in the selection of [employee] as his agent to use reasonable care to ascertain his competency to drive a car and the existence of habits which would make it unsafe to place so dangerous an agency in his charge. The owner owed a duty to the public to know something about the character and habits of an employee in whose charge he placed an automobile." *Id.* at 651. See also, *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570 (Tex. 1985) (negligence from failure to ask if employee-driver had commercial license); *Southwestern Bell Tel. Co. v. Davis*, 582 S.W.2d 191 (Tex. App. 1979) (negligence found for failure to inquire as to employee's driving record).

In light of this precedent, the majority erred in concluding that "every other court to address the question has treated employer-entrustor just like any other entrustor." (p. 4; App. 4). In fact, in only one of the cases cited in the decision was there an occasion to address the issue of whether an employer has any duties of inquiry.[4] None of the cited cases involve a situation where the employee-driver was not properly licensed. Therefore, it can be said that in all of the cases where the question has been addressed, it has been held that there is an affirmative duty to ascertain fitness before entrusting a vehicle to an employee.

II

The Circuit Court Majority Failed To Apply the Proper Standards In Determining That the Findings Were Clearly Erroneous

Liability for negligent entrustment of a vehicle is determined by applying general principles of negligence, and ordinarily it is for the trier of fact to determine whether an owner has exercised the required degree of care. *Allen v. Toledo*, 109 Cal.App.3d 415, 167 Cal.Rptr. 270 (1980). According to the Restatement, in this instance it was for the trial judge as the trier-of-fact to determine the

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[4] *Abraham v. S.E. Onorato Garages*, 446 P.2d 821 (Haw. 1968) held no duty to inquire about his criminal record under the circumstances where employee had already been working three years, had performed exemplary service during that time, was successfully bonded, previous job checked out and had a valid driver's license. By implication, the case is authority that under different, less reassuring circumstances, such a duty would arise.

standard of conduct necessary to prevent unreasonable risk of harm to others from the facts presented. Rest. 2d, Torts, §285(d).

The district court concluded that Creative Tours had negligently entrusted its vehicle to Ronnie, both in terms of Section 308 and Section 390 of the Restatement (Second) of Torts. (App. 17). Prefacing the Conclusions of Law, the district court states that they are to be considered findings of fact as well. (App. 15). This is appropriate because the determination of negligence is a mixed question of law and fact. *Bunting v. U.S.*, 884 F.2d 1143 (9th Cir. 1989). On appeal, the mixed question of law and fact whether the established facts constitute negligence is an exception to the general rule that mixed questions are reviewed de novo; the Court of Appeals reviews the district court's findings and conclusions regarding negligence under the clearly erroneous standard. *Louie v. U.S.*, 776 F.2d 819 (9th Cir. 1985).

The parameters for review of findings by a district court have been summarized.

> The district court's decision can be overturned only if clearly erroneous. We cannot retry issues of fact nor supplant the district court's judgment with that of our own. We must consider the district court's findings as presumptively correct. We are required to take the evidence as a whole, and consider it in the light most favorable to appellees. *State Farm Mut. Auto. Ins. Corp. v. White*, 563 F.2d 971, 977 (9th Cir. 1977).

Here, the majority did not consider the findings in the light most favorable to appellees, did not presume them

correct and did substitute its judgment for that of the district court.

The Supreme Court has also emphasized the deference that must be given the district court's findings under the clearly erroneous standard.

> This standard plainly does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. [citation] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

As further explained in *Anderson*, this is so not only because of the trial judge's superior position to decide the facts, but also his experience and expertise in doing so, and because the parties should not have to try the facts of the case a second time on appeal. *Id.* at 574-575, 105 S.Ct. at 1512.

Negligence requires knowledge of the peril one's actions are putting others in. But there is something the

law deems to be the same as that knowledge: the opportunity by the exercise of reasonable diligence to acquire knowledge. *Nisbet v. Van Tyl*, 241 F.2d 874 (7th Cir. 1957).

> Every person is under a duty to exercise his senses and intelligence in his actions in order to avoid injury to others, and where a situation suggestions investigation and inspection in order that its dangers may fully appear, the duty to make such investigation and inspection is imposed by law. * * * One under duty to use care for which knowledge is necessary can not escape liability for negligence because of voluntary ignorance. *Id.* at 877.

The district court found that the management of Creative Tours had the opportunity, in the exercise of reasonable diligence, to ascertain Ronnie's driving qualifications, but voluntarily remained ignorant. In other words, they were negligent because "a reasonable man would recognize the necessity of making further investigation." Rest. 2d, Torts, §289, com. j. Given the circumstances existing when Ronnie applied for work, the duties involved, the open opportunity allowed for abuse of the company vehicles and the status and background Ronnie did disclose, it simply cannot be rationally concluded that the district court's finding is not plausible when considered in its most favorable light.

The district court judge understood the facts much more fully than the circuit court justices, who sit over 6000 miles away and have never experienced the unique blend of culture, language, mores and customs that this Micronesian island community offers. As an example of how the majority did not fully appreciate all the facts, the

decision concludes that failure to have a written contract with Ronnie would not lead Creative Tours to suspect he could not drive competently. (App. 6). That might be true in the United States, but here in the CNMI things are different. Because we control our own immigration and the U.S. Immigration and Naturalization Service has no jurisdiction here, and because the U.S. minimum wage standards do not apply here, a large number of aliens supplement the work force. For the most part the workers are unskilled or semi-skilled from lesser-developed countries. The process of hiring such workers is highly regulated to serve the policy of giving preference for jobs to local citizens. 3 CMC §4411(a). Alien workers are permitted to work in only one particular job, i.e., for only one employer and in only one job category. 3 CMC §4437(e). To obtain a work permit, the alien applicant's qualifications and work experience must be documented by affidavit which shows a minimum of two years experience in the job category and verifies their occupational qualifications by letters of reference. 3 CMC §4434(b). Contracts must be in writing and conform to certain statutory requirements and be approved by the Chief of Labor. 3 CMC §4433. Employers must verify certain percentages of the work force to be resident workers as a precondition to employing aliens. 3 CMC §4436(a). A bond is required of the employer. 3 CMC §4435(a). After approval, the worker receives a work permit card that identifies him, the employer, the job title, the expiration and assigns a number to the agreement. 3 CMC §4435(a). Hiring someone in violation of these provisions is a crime. 3 CMC §4447(e).

Despite the fact that Creative Tours' management knew about the legal requirements for hiring aliens, they hired Ronnie illegally with none of the requirements fulfilled. This meant that his personal and educational background, and his job history and qualifications, which would ordinarily have been documented as a matter of course, were unknown and unverified. But they chose to remain voluntarily ignorant of all things except whether Ronnie could speak and deal with their Japanese clientele.

The district court, whose civil caseload is over one-third labor complaints from alien workers, possesses a familiarity with the local labor laws and regulations, and the general situation as it relates to employment of alien workers. He also drives the roads, knows their special characteristics, and understands the risk peculiar to driving on Saipan. The circuit court was required to give the district court's findings of fact greater deference. The finding that Creative Tours should have, in the exercise of reasonable diligence, inquired about Ronnie's qualifications to drive is not implausible; it is not clearly erroneous.

III

The Circuit Court Decision Goes Against the Precepts of the Federal Rules of Civil Procedure In Attempting to Justify Its Conclusion

The decision of the majority creates a dicotomy between Creative Tours' capacity as an entrustor and as an employer, and assumes that it "has been sued only as an owner, . . . " and not as an employer. (p. 4; App. 4). It

does so by concluding that "Islam's complaint charged Creative Tours with negligently entrusting an automobile to Ronnie Islim, not with negligently hiring him . . . ". *Id.* This device of dissecting the roles of an employer in order to avoid dealing with one of the key facts in the case is inconsistent with and contrary to procedural and substantive law.

The complaint plainly alleges that Ronnie was an employee and that Creative Tours negligently entrusted the Toyota to him. (App. 23). The majority decision implies that had plaintiffs used the word "employee" instead of "operator" in paragraph 9, then the decision might be different. (p. 4; App.4). This is plainly wrong. It runs contrary to the basic tenets and purposes of the Federal Rules of Civil Procedure. Rule 8(f) requires that all pleadings be construed to do substantial justice.

> Thus the parties in federal suit are granted the relief to which they are entitled under the facts. 'The legal rights of [the parties] are determined by the law and facts as established in the case and not by some language in the claim.' A party should not have to discover at trial that a chosen legal theory is the 'wrong' one, and the choice of the 'wrong' theory will not preclude recovery under a 'correct' one.
>
> . . .
>
> It is thus sufficient if the prevailing party shows it is 'entitled to any relief the court can grant regardless of whether it asks for the proper relief.' A party may further state the same claim alternatively or hypothetically in the same count or in separate counts, and will not be required

> to make an election between inconsistent theories. And Rule 15 allows pleadings to be amended during and after trial, changing the legal theory of the case. *Even without an amendment, however, a party is entitled to any relief justified by the evidence.* 2A *Moore's Federal Practice,* sec. 8.14, pp. 8-75-76. (Emphasis added).

See also, Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); *Janke Construction Co. v. Vulcan Materials Co.,* 527 F.2d 772, 776 (7th Cir. 1976) ("the fact that [plaintiff] misconceived the legal theory of his case does not preclude it from obtaining relief under another theory."); *Sessions v. Chrysler Corp.,* 517 F.2d 759, 761 (9th Cir. 1975).

The complaint must be considered in its entirety, and it is not proper to consider parts of it separately from the whole to draw inferences unintended by the pleader. *Banco Continental v. Curtiss Nat. Bank of Miami Springs,* 406 F.2d 510 (5th Cir. 1969); *Buchanan v. Seaboard Air Lines R.G.,* 80 F. Supp. 976 (D.C.S.C. 1948).

Especially on appeal it is wrong to decide the case on what theory was pled. *Conley v. Amalgamated Sugar Co.,* 263 P.2d 705, 706 (Idaho 1953) (" . . . judgment aids the pleadings, which then must be liberally construed to sustain the judgment."); *Genova v. Johnson,* 321 P.2d 1050 (Or. 1958). The case has already been tried with employment and the circumstances of hiring as being part of the operative facts. In fact, the conclusions of law specifically

include reference to Ronnie as an employee of Creative Tours, and its failure to check his qualifications in the context of that relationship. (See Conclusions of Law Nos. 6-8; App. 17).

The basis of the majority's decision, therefore, rests on a theory that: (1) was never briefed or argued by either party, (2) is contrary to the letter and spirit of the Federal Rules of Civil Procedure, and (3) ignores facts that were uncontradicted at trial and part of the findings and conclusions. The majority impliedly concedes its own error by stating that it is admitted in the decision that the dissent may be correct if the issue were framed in terms of an employer's duty.[5]

CONCLUSION

This case does not offer issues with nationwide impact that will affect large numbers of people. Admittedly, even in the microcosm of this small island community, these two men are not counted among the prominent or important people. But this is a clear, indeed, egregious case where a United States Court of Appeals has erred – erred in terms of how it has applied not only substantive law but also how it has interpreted and applied procedural rules well settled by this Court, in order to overturn findings of the District Court.

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[5] "The dissent misconstrues what is at issue here. It contends that 'an employer's duty to inquire about qualifications must turn on the circumstances of, and the risks being created by, the employment.' Dissent at 2. Perhaps so." (p. 4; App. 4).

These errors manifest a departure by the court of appeals so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision; and it has decided a federal question (i.e. application of the "clearly erroneous" standard and application of the standards of pleadings under the Federal Rules of Civil Procedure) in a way that conflicts with applicable decisions of this Court. In so doing, the court of appeals has replaced justice with an injustice.

Petitioners pray that the Court grant certiorari for review of this case.

Respectfully submitted,

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Attorney for Petitioners.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYED WAHIDUL ISLAM; MAHABUB ALAM BHUIYAN, Plaintiffs-Appellees, v. CREATIVE TOURS MICRONESIA, INC., Defendant-Appellant.	No. 92-16684 D.C. No. CV 91-0024 ARM **MEMORANDUM*** (Filed Sept. 2, 1994)

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, District Judge, Presiding

Argued and Submitted
November 4, 1993
Honolulu, Hawaii

Before: POOLE, WIGGINS and T.G. NELSON, Circuit Judges.

Creative Tours Micronesia, Inc. ("Creative Tours") appeals from the district court's judgment in favor of Syed Wahidul Islam and Mahabub Alam Bhuiyan on their claim for negligent entrustment. Islam and Bhuiyan were passengers in a Creative Tours automobile driven by an off-duty Creative Tours employee, Mohammed Nazrul

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Islim ("Ronnie"), and were seriously injured when the employee lost control of the car. We reverse.

I

We review the district court's findings of negligence under two separate standards. "[I]ssues of breach and proximate cause are questions of fact, reviewable for clear error." *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). However, "[t]he existence and extent of the standard of conduct are questions of law, reviewable *de novo*." *Id.*

In this diversity case, Commonwealth of the Northern Mariana Islands (CNMI) law governs. In the absence of CNMI case law or statutes, the common law as expressed in the Restatements, or to the extent not expressed, as understood in the United States, applies. 7 CMC § 3401. The CNMI Supreme Court recently issued its first and only published negligent entrustment decision, *Yoo v. Ouitugua*, No. 93-011 (May 12, 1994). This case is therefore governed by *Yoo* and the Restatements.

The parties agree that Ronnie Isl[i]m was an inexperienced, unlicensed driver with a prior accident history. They also agree that Creative Tours had no actual knowledge of this fact. Where they disagree is over whether Creative Tours ought to have known.

The District Court concluded that, prior to entrusting an employee with an automobile, Creative Tours had a duty to investigate his driving background. Creative Tours' primary contention on appeal is that under the Restatements, they owed no such duty. Sections 308 and

390 of the Restatement (Second) of Torts cover the principles of negligent entrustment:

> It is negligence to permit a third party to use a thing . . . which is under the control of the actor, *if the actor knows or should know* that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others

Restatement (Second) of Torts § 308 (1965) (emphasis added).

> One who supplies . . . a chattel for the use of another whom the supplier *knows or has reason to know* to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others . . . is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965) (emphasis added).

Yoo v. Ouitugua confirms what other state courts have unanimously concluded: § 308 and § 390 do not create an affirmative duty of inquiry. "In order to find [defendants] liable under section 390, Restatement of Torts, the trial court had to find that they knew or had reason to know of [the entrustee's] incompetence to drive . . . " *Yoo* at 7; *accord Mullins v. Harrell*, 490 So. 2d 1338, 1340 (Fla. App. 1986); *Abraham v. S.E. Onorato Garages, Inc.*, 446 P.2d 821, 825-26 (Haw. 1968); *Herbert v. Whittle*, 517 A.2d 358, 363 (Md. App. 1986); *McCarson v. Foreman*, 692 P.2d 537, 541-42 (N.M. App. 1984); *Moore v. Kiljander*, 604 P.2d 204, 206 (Wyo. 1979). Accordingly, under CNMI law, entrustors of chattels are under no initial, affirmative duty to

inquire into the competence of their entrustees. However, once an entrustor does know facts which would cause a reasonable person to inquire further, it may be liable for failing to do so.

The District Court concluded that "Creative Tours, prior to hiring an employee whose duties consisted primarily of driving to various locations to assist tourists, had a duty to inquire about the experience, driving record, and qualifications of the prospective employee." However, §§ 308 and 390 relate to the tort of negligent entrustment, not the tort of negligent hiring. Islam's complaint charged Creative Tours with negligently entrusting an automobile to Ronnie Islim, not with negligently hiring him, and his argument, both in the district court and on appeal, was based on negligent entrustment. Whatever Creative Tours' duty might have been in employing Islim, it had no affirmative duty of inquiry, in its role as owner of the Toyota Corolla, prior to entrusting the car to Islim.

The dissent misconstrues what is at issue here. It contends that "an employer's duty to inquire about qualifications must turn on the circumstances of, and the risks being created by, the employment." Dissent at 2. Perhaps so. But Creative Tours has been sued only as an owner, and under the clear rules of ownership liability, it cannot be held liable solely for failing to inquire into its entrustee's compentence.

Nothing in the majority disposition "shields an employer from liability" for "fail[ing] to inquire about an employee's license to drive." Dissent at 2. Employers may or may not be liable under theories not at issue here. We

simply apply to this car owner the same rule that applies to all other car owners. The dissent is conspicuously devoid of any authority to suggest that some other interpretation of §§ 308 and 390 actually applies when the entrustor is also an employer. The reason for this is simple: every other court to address the question has treated employer-entrustors just like any other entrustor. *See, e.g., Mullins,* 490 So. 2d at 1340 (finding no liability because "there is nothing in the record to suggest that defendant had any basis or suspicion to foresee that [the employee driver] was unreliable, dishonest, or incompetent in any way."); *Abraham,* 446 P.2d at 825-26; *Curley v. General Valet Serv., Inc.,* 311 A.2d 231, 237 (Md. App. 1973); *Burley v. Hudson,* 448 A.2d 375, 377 (N.H. 1982); *McCarson,* 692 P.2d at 541-42.

II

Islam and Bhuiyan contend that we can affirm in any event because the record contains sufficient evidence to support the District Court's finding that Creative Tours had reason to know of Ronnie Islim's incompetence. We have reviewed the record, and we cannot agree.

Appellees point to the following information known by defendant: 1) Ronnie did not display a driver's license and was not asked about one, 2) Ronnie did not own a car, 3) Ronnie was a citizen of Bangladesh, 4) Ronnie's application showed no jobs requiring driving, 5) Ronnie did not sign a written contract, as provided for by 3 CMC § 4434, and 6) Creative Tours was principally interested in the language skills of its employees.

This list is notable only for its utter unremarkableness. Nothing in the list offers any affirmative reason to suspect Ronnie could not drive competently. Ronnie never said he had no license, so absent a duty to inquire, his failure to proffer one is irrelevant. The inability to drive is surely only one of many reasons people don't own cars; for instance, an individual may not be able to afford one, or may not feel the need. Nor can one categorically assume that foreigners are incompetent drivers. *Cf. Johnson v. Casetta*, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961) (fact that car buyer couldn't speak English triggered no duty to inquire further). If having never held a position requiring on-the-job driving were grounds for suspicion, the majority of the work force would be suspect. Creative Tours' failure to have Ronnie sign a written contract was not something it "knew" which would lead it to suspect that Ronnie couldn't drive competently. Finally, Creative Tours' priorities in hiring have nothing to do with what facts they knew or had reason to know.

Creative Tours was under no affirmative duty to inquire into Ronnie Islam's competence before entrusting him with an automobile. Nor did they know of any facts which ought to have led them to inquire further. Therefore, they cannot be found liable for negligent entrustment. We reverse the judgment of the district court.

REVERSED.

Islam, et al., v. Creative Tours Micronesia, Inc., No. 92-16684

WIGGINS, J., dissenting.

I respectfully dissent.

I think it is possible to affirm the conclusion reached by the district court and policy concerns dictate that we should do so.

The majority correctly observes that our decision should be guided by *Yoo v. Ouitugua*, No. 93-011 (CNMI, May 12, 1994) and the Restatement (Second) of Torts. *Yoo* seeks the guidance of the Restatement and we should do so likewise. There are two sections of the Restatement that are implicated by this case: § 308 and § 390. Section 308 imposes liability upon the owner of a vehicle who permits a third party to use it if the owner "should know" of the third party's "likely" use of the car in a negligent manner. Section 390 similarly turns upon factual determinations. Liability is imposed on an owner "has reason to know" of the third party's likely negligence. The district court found liability here to exist. We have no special right to second-guess those factual determinations.

Nor can I agree on the legal issue. The Restatement does not direct an assessment of the reasonableness of the entrustment or employment based solely on the facts that happen to be exposed. Instead, it provides that a person sometimes may be expected to know certain facts. Surely one cannot know that an accident will occur. One may, however, be expected to take reasonable steps to lessen the risk of the accident. The scope of an employer's duty

to inquire about qualifications must turn on the circumstances of, and the risks being created by, the employment. I do not believe it is proper to announce a rule that shields an employer from liability because that employer was so irresponsible as to fail to inquire about an employee's license to drive when driving would clearly be within the scope of that employee's duties. *Yoo* does not compel such a result because it involved actual, not constructive, knowledge of the lack of a license.

Given the knowledge of the owner found by the district court to exist, Creative Tours should have inquired of the licensing status of their driver and it was negligent to not make such an inquiry.

I would affirm the judgment in favor of Islam.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

SYED WAHIDUL ISLAM and MAHABUB ALAM BHUIYAN, Plaintiffs, v. CREATIVE TOURS MICRONESIA, INC., Defendant.	Civil No. 91-0024 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Aug. 25, 1992)

THIS MATTER came before the Court on Monday and Tuesday, May 18 and 19, 1992 for trial, jury having been waived by stipulation in open court. The parties' proposed findings of fact and conclusions of law were filed on Tuesday, June 2, 1992. Plaintiffs were represented by Mr. Jay Sorensen. Defendant was represented by Mr. David W. Dooley of Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, with Ms. Marcia K. Schultz of that firm as local counsel pursuant to Local Rule 100-1(f). After considering the evidence adduced at trial and the briefs and memoranda filed by counsel, the Court hereby enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiffs Mr. Syed Wahidul Islam ("Islam") and Mr. Mahabub Alam Bhuiyan ("Bhuiyan") are citizens of Bangladesh.

2. Defendant Creative Tours Micronesia, Inc. ("Creative Tours") is a corporation organized in the Territory of Guam under Guam law, doing business in Guam and in Saipan, Commonwealth of the Northern Mariana Islands (CNMI). Creative Tours is in the business of organizing and conducting tour groups from Japan to Guam and Saipan.

3. Creative Tours had some vehicles that were used by the personnel in its airport division for their transportation to other hotels, where they would assist tourists to check out, board a bus and go to the airport for departures and arrivals. Among the vehicles was a 1990 White Toyota Corolla, leased by and under the control of Creative Tours.

4. The vehicles were routinely parked outside the Nikko Hotel, where Creative Tours' main Saipan office was located. The keys were kept in an unsecured file drawer, which was available to all the employees. Because their operations were at all hours of the day and night, the keys and vehicles were available at all hours. Creative Tours had a policy, not promulgated in writing, that employees were to use the vehicles for business purposes only. There was no system to check out the keys or vehicles nor any record kept of vehicle use.

5. On January 8, 1991, Creative Tours hired Mr. Mohammed Nazrul Islim, known as "Ronnie", to be a part of their airport division. His duties were to meet Creative Tours' tour groups to assist with baggage and check-in at the airport and at the several hotels in Saipan where the tourists stayed.

6. Ronnie was hired by Creative Tours' general manager of the Saipan office, Mr. Kintaro Nezu ("Nezu"). Nezu knew that Ronnie had lived in the CNMI for approximately four years and had been recommended to Creative Tours by his brother, who was employed by a competing tour agency.

7. Nezu saw Ronnie driving Ronnie's brother's car before he was hired, and knew that Ronnie had no car of his own.

8. At the time Nezu hired Ronnie, Nezu explained to Ronnie that he would be required to operate a motor vehicle in order to perform his job.

9. Neither Nezu nor anyone for Creative Tours ever asked Ronnie or otherwise determined if he had a driver's license.

10. Ronnie never mentioned that he did not have a CNMI driver's license.

11. Ronnie was never issued a driver's license while in the CNMI.

12. Neither Nezu nor anyone asked or otherwise determined anything about Ronnie's driving experience or qualifications.

13. Ronnie had only limited driving experience before he was hired by Creative Tours. Since he arrived in the CNMI in 1986, his jobs were as a stevedore and security guard, neither of which required him to drive.

14. In August, 1989, Ronnie took a car which had been leased by a friend of his without permission and was involved in a two-car collision. That collision

resulted in a lawsuit against Ronnie and others, wherein he was charged with negligence in causing the collision and insurance coverage was denied on the grounds of Ronnie not having a driver's license. That action was on file and pending against Ronnie in this Court when Ronnie was hired by Creative Tours.

15. During the approximately two months Ronnie worked for Creative Tours, Creative Tours received no complaints about Ronnie's driving, work performance, or use of alcohol, nor observed incompetent driving by Ronnie.

16. On March 15, 1991, plaintiffs attended a birthday party at the barracks where Islam then lived, located next to the garment factory where he worked. At the party there was eating, drinking and dancing. Plaintiffs each had two or three beers during the party and ate dinner.

17. Ronnie came to the party about 7:30 p.m. He drove Creative Tours' Corolla to the barracks where the party was. He ate and talked to friends. He drank beer and whiskey.

18. At about 11:30 p.m., plaintiffs, Ronnie and others left the room where the party was and went out to the area in front of the garment factory where the employees often sat and spent time and where the cars were parked. They stayed there and talked for over an hour before leaving. There was no drinking during that time.

19. Plaintiffs had the opportunity to see Ronnie walk and hear him talk. Ronnie did not appear to display signs of being intoxicated.

20. Ronnie offered Bhuiyan a ride home. He also invited Islam for a ride along with three Koreans who also worked at the garment factory. They got in the Corolla. Four men were in the back, with the two plaintiffs in the center of the back seat. Ronnie was driving and the other Korean was in the front passenger seat.

21. Ronnie drove the car down the hill without incident to the intersection with Middle Road. Ronnie turned left at the intersection. Islam asked him why, knowing it was the wrong direction to take Bhuiyan home. Ronnie then began accelerating, driving fast, passing two or three cars, exceeding the speed limit and making unsafe lane changes. Islam told Ronnie he should show down, but Ronnie ignored him. After driving a mile or two, Ronnie lost control of the Corolla, and went off the road.

22. Ronnie was negligent in operating the Corolla in the early morning of March 16, 1991.

23. The conduct of neither plaintiff regarding the protection of their own safety, fell below the standard of a reasonable person under like circumstances.

24. As a proximate result of Ronnie's negligence plaintiffs were injured.

25. Bhuiyan suffered a displaced, bayonet fracture of the right clavicle, minor fractures of the left clavicle and right pelvis, and a contusion to the head. The major fracture was considered fused by the treating orthopedic

surgeon on July 17, 1991. He continues to have complaints of pain in the right shoulder when raising his right arm. This should heal without any permanent injury.

26. Islam suffered a subluxation of the C3-C4 vertebrae. After two months of conservative treatment, the treating orthopedic surgeon recommended surgery, which was done on May 15, 1991. The C2-C3-C4 vertebra were wired together and bone from plaintiff's right hip was used to fuse the vertebral joints together.

27. Islam has a permanent disability, which at the time of trial is still resolving. He has a limitation of the range of motion in extension and flexion of his neck. He will be unable to do some physical activities for the rest of his life, including running and lifting heavy objects. The inflexibility of the three vertebra and two joints will put greater stress on the adjoining joints and will significantly increase the risk of arthritis later in life.

28. Either during the auto collision or the subsequent surgery, Islam experienced a neuroma, a severed and displaced nerve ending, causing pain which at the time of trial was still resolving. This is expected to completely resolve itself.

29. Bhuiyan incurred medical expenses in the amount of $165.00.

30. Islam incurred medical expenses in the amount of $1,687.00.

31. As a proximate result of his injuries, Bhuiyan lost time from work as a security guard and lost income in the amount of $1,133.44.

32. As a proximate result of his injures, Islam lost time from work as a security guard, which to the time of trial, amounted to $5,626.00 in lost income.

33. In the trial of this matter, Creative Tours vigorously opposed liability, but agreed on the record that the damages prayed for were reasonable.

34. Bhuiyan suffered general damages in the amount of $30,000.00.

35. Islam suffered general damages and loss of future income in an amount of $200,000.00.

II. CONCLUSIONS OF LAW

The following conclusions of law, insofar as they may be considered findings of fact, are so found by this Court to be true in all respects.

1. Jurisdiction by diversity of alienage exists under 48 U.S.C. § 1694a(a) (1988) and 28 U.S.C. § 1332(a)(2), (d) (1988).

2. When sitting in diversity a federal court applies substantive state law as its rules of decision. 28 U.S.C. § 1652 (1988). The relationship between the federal courts and those of the CNMI is the same as that between the federal and state courts. 48 U.S.C. § 1694c(a) (1988).

3. Absent CNMI statute, CNMI case law, or local customary law, the rules of the common law as expressed in the restatements of the law approved by the American Law Institute are the rules of decision when applying CNMI law. 7 Commonwealth Code (CMC) § 3401 (1984).

4. The Restatement (Second) of Torts (1965) provides:

> **Section 308.** *Permitting Improper Persons to Use Things or Engage in Activities.*
>
> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

> **Section 390.** *Chattel for Use by Person Known to be Incompetent.*
>
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

5. The rule in Restatement (Second) of Torts § 390 (1965) is a special application of the rule stated in Restatement (Second) of Torts § 308 (1965). Restatement (Second) of Torts § 390 Comment b (1965).

6. Creative Tours entrusted the vehicles under its control, including the 1990 White Toyota Corolla involved in this case, to its employee, Ronnie, during the approximately two month period of his employment.

7. Creative Tours, prior to hiring an employee whose duties consisted primarily of driving to various locations to assist tourists, had a duty to inquire about the experience, driving record, and qualifications of the prospective employee.

8. Creative Tours breached its duty by failing to inquire of Ronnie or anyone else about Ronnie's driver's license, accident record, or other driving experience, driving record, and qualifications.

9. Creative Tours should have known that Ronnie was likely to use its vehicles or conduct himself in the activity of driving in such a manner as to create an unreasonable risk of harm to others. Restatement (Second) of Torts § 308 (1965).

10. More specifically, Creative Tours had reason to know that Ronnie, because of his inexperience, his driving record and his lack of qualifications as a driver, would use its vehicles in a manner involving unreasonable risk of physical harm to himself and others whom Creative Tours should have expected to share in or have been endangered by their use. Restatement (Second) of Torts § 390 (1965).

11. As a proximate result of the negligent entrustment by Creative Tours, plaintiffs were injured, incurred medical expenses, loss of income and general damages.

12. Neither plaintiff was contributorily negligent.

III. CONCLUSION

Judgment shall enter for plaintiffs as indicated above.

IT IS SO ORDERED.

DATED this 25th day of August, 1992.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

SYED WAHIDUL ISLAM and MAHABUB ALAM BHUIYAN, Plaintiffs, v. CREATIVE TOURS MICRONESIA, INC., Defendant.	Civil No. 92-0024 JUDGMENT (Filed Aug. 25, 1992)

THIS MATTER came before the Court on Monday and Tuesday, May 18 and 19, 1992 for trial, Honorable Alex R. Munson, District Judge, presiding, jury having been waived by stipulation in open court. The issues have been duly tried and the Court's "Findings of Fact and Conclusions of Law" has been duly rendered and is being filed concurrently. Pursuant to Fed.R.Civ.P. 58 and Fed.R.Civ.P. Form 32, judgment is entered against Defendant in favor of Plaintiffs as follows:

1. Plaintiff Mr. Mahabub Alam Bhuiyan is awarded reimbursement for medical expenses in the amount of $165.00; reimbursement for lost income in the amount of $1,133.44; and reimbursement for general damages in the amount of $30,000.00, totalling $31, 298.44, plus his costs of action.

2. Plaintiff Mr. Syed Wahidul Islam is awarded reimbursement for medical expenses in the amount of $1,687.00; reimbursement for lost income in the amount of $5,626.00; and reimbursement for general damages in

the amount of $200,000.00, totalling $207,313.00, plus his costs of action.

3. Post-judgment interest is allowed as required by and as set forth in 28 U.S.C. § 1961(a) (1988).

IT IS SO ORDERED AND ADJUDGED.

DATED this 25th day of August, 1992.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

Costs are hereby taxed in the following amount as stipulated by the parties on September 24, 1992 and included in the judgment: $1,228.20

Dated this 24th day of September 1992.

/s/ Galo L. Perez,
Galo L. Perez, Clerk of Court

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYED WAHIDUL ISLAM AND MAHABUB ALAM BHUIYAN Plaintiff-Appellees, v. CREATIVE TOURS MICRONESIA, INC., Defendant-Appellant.	No. 92-16684 DC No. 91-0024 **ORDER** (Filed Feb. 23, 1995)

Before: POOLE, WIGGINS, and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS

SYED WAHIDUL ISLAM and MAHABUB ALAM BHUIYAN, Plaintiffs, v. CREATIVE TOURS MICRONESIA, INC., Defendant.	CIVIL CASE NO. CV 91-0024 COMPLAINT (Filed July 9, 1991)

Plaintiffs allege:

1. Jurisdiction of this matter is vested in this court pursuant to 28 U.S.C. §1332(a)(2) and 48 U.S.C. §1694A(a).

2. Plaintiffs are citizens of Bangladesh.

3. Defendant is a corporation organized and existing under the laws of the Territory of Guam, doing business in Saipan, Northern Mariana Islands.

4. On or about March 16, 1991, during the early morning hours, plaintiffs were passengers in an automobile described as a 1990 Toyota Corolla, license number AAZ-001, which was being operated by one Mohammed Nazrul Islim, as it was being driven in a southerly direction on W-2 highway in Garapan, Saipan, N.M.I.

5. As a proximate result of the negligence of said operator of the aforementioned 1990 Toyota Corolla, it collided with cars parked off the roadway.

6. At all relevant times, the aforementioned 1990 Toyota Corolla was under lease to and in the control of defendant.

7. At all relevant times, Mohammed Nazrul Islim was employed by defendant.

8. At all relevant times, Mohammed Nazrul Islim was in the course and scope of his employment with defendant.

9. Defendant negligently entrusted the 1990 Toyota Corolla to the operator, Mohammed Nazrul Islim.

10. As a proximate result of the negligence of defendant, plaintiffs suffered serious bodily injury, incurred medical costs and expenses, lost income and were injured in their health, strength and activity, all in an amount according to proof at the time of trial.

11. Plaintiffs' damages exceed the sum or value of $50,000, exclusive of interest and costs.

WHEREFORE, Plaintiffs pray for judgment awarding them:

1. Damages according to proof;

2. Costs of suit;

3. Such other and further relief as the court may deem proper.

/s/ Jay H. Sorensen
JAY H. SORENSEN
Attorney for Plaintiffs

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS

JUNG KEON YOO, Plaintiff/Appellee, vs. NICOLASA QUITUGUA, JEFFREY QUITUGUA, a Minor,	)	APPEAL NO. 93-011 CIVIL ACTION NO. 90-722 OPINION (Filed May 12, 1994)

Submitted on the Briefs February 11, 1994

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BEFORE: DELA CRUZ, Chief Justice, VILLAGOMEZ, Justice, and BELLAS, Special Judge.

Dela Cruz, Chief Justice:

This is a personal injury action arising from an automobile accident. Judgment in the amount of $66,105 plus costs was entered against Jeffrey Quitugua, a minor, and his parents Nicolasa and Daniel Quitugua. Mrs. Quitugua and Jeffrey appeal the trial court's finding of parental liability based on negligent entrustment of the family

truck to Jeffrey, and unlicensed minor.[1] Because the facts of this case support a finding of liability based on negligent entrustment, we affirm the judgment below.

I.

On the evening of October 1, 1989, while driving his parents' truck, Jeffrey collided with the plaintiff Jung Keon Yoo's sedan. Mr. Yoo suffered serious and permanent bodily injuries. The collision occurred after a high speed chase of Jeffrey by the police. Jeffrey was intoxicated.

At the time of the accident, Jeffrey was only 16 years old. He did not have a driver's license, and his mother knew he had no license to drive. The trial court found that Jeffrey's parents had allowed him to use the truck "many" times prior to the accident, despite their knowledge that he did not have a license to drive. (Findings of Fact and Conclusions of Law, Jan. 4, 1993, "Order" Findings of Fact Nos. 14 & 15.)

In finding liability based on negligent entrustment, the court stated: "Nicolasa and Daniel Quitugua had reason to know because of Jeffrey's youth, inexperience, his lack of [a] driving record and his lack of qualifications as a driver, [that he] would use the Toyota pickup truck in a manner involving unreasonable risk of physical harm to himself and others whom defendant parents should have expected to share in or have been endanger[ed] by his use." (Order, Conclusions of Law, No. 8.)

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[1] Mr. Quitugua does not appeal.

II.

Mrs. Quitugua raises two issues for our review.

The first issue is her contention that 6 CMC §§ 5201-5202 absolves parental liability for the delinquent acts of a minor, including the car accident at issue. She argues that the trial court erred in applying the theory of negligent entrustment found in the Restatement (Second) of Torts in view of 6 CMC §§ 5201-5202 which precludes parental liability here.

The issue of whether a particular law applies or not is a legal question. Therefore, our review is *de novo*. *Sonoda v. Villagomez*, No. 92-034 (N.M.I. Sept. 15, 1993).

The second issue, assuming the theory of negligent entrustment applies, challenges the ultimate finding of parental liability based on negligent entrustment. This issue essentially questions the sufficiency of the evidence supporting liability based on negligent entrustment and thus, the trial court's findings of fact. Our review of this issue, therefore, is for clear error. *Apatang v. Mundo*, No. 92-025 (N.M.I. Feb. 22, 1994).

III.

A. The Applicability of the Juvenile Delinquency Statute.

Mrs. Quitugua argues that 6 CMC §§ 5201-5202[2] apply to this case and precludes parental liability here. She contends that, in view of this statute, the trial court

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[2] 6 CMC § 5201-5202 (Supp. May 1986) reads:

§ 5201. Authority of Parent Over Child.

A parent or guardian having custody of a child is charged with the control of the child and has the power to exercise parental control and authority over the child.

§ 5202. Liability of Parent or Guardian.

(a) In any case where a child is found delinquent and placed on probation, if the Court finds at the hearing that the parent or guardian having custody of the child has failed or neglected to subject the child to reasonable parental control and authority, and that the failure or neglect is the proximate cause of the act or acts of the child upon which the finding of delinquency is based, the Court may require the parent to enter into a recognizance with sufficient surety, in an amount of not more than $100, conditioned upon the faithful discharge of the conditions of probation of the child.

(b) If the child thereafter commits a second act and is for that reason found delinquent, or violates the conditions of probation, and the Court finds at the hearing that the failure or neglect of the parent to subject the child to reasonable parental control and authority or to faithfully discharge the conditions of probation of the child on the part of the parent is the proximate cause of the act or acts of the child upon which the second finding of delinquency is based, or upon which the child is found to have violated the conditions of probation, the Court may declare that all or a part of the recognizance shall be applied in payment of any damages; otherwise, the proceeds therefrom, or any part remaining after the payment of damages as aforesaid, shall be paid into the Commonwealth general fund.

erred in applying the common law theory of negligent entrustment set forth in the Restatement (Second) of Torts. 7 CMC § 3401. We reject this argument as frivolous.

Sections 5201 and 5202 relate to parental liability for the *delinquent* acts of a juvenile placed on probation. The case before us is a civil action asserting liability of any actor (not necessarily a parent) for negligent entrustment. Just as the criminal laws do not preclude an injured party from seeking civil damages for harm suffered as a result of criminal conduct, a party is not precluded from seeking damages from a minor and his parents for damages suffered at the hands of that minor. Therefore, we reject the argument that the juvenile delinquency statute set forth in 6 CMC § 52-1-5202 is a "written law" which precludes the application of the Restatement provision on negligent entrustment.

B. The Issue of Negligent Entrustment.

The second issue is whether the trial court's finding of parental liability based on negligent entrustment constituted error. Mrs. Quitugua argues that there was no evidence to support a finding that Jeffrey was incompetent to drive. She asserts that Jeffrey was (1) not an inexperienced driver, (2) not physically or mentally handicapped, (3) old enough to drive even though not licensed, and (4) not intoxicated at the time he took the truck. Further, there was no evidence that Mr. and Mrs. Quitugua knew Jeffrey was likely to become intoxicated or under the influence of drugs on the night of the accident. Finally, she contends that there was no evidence

that Jeffrey was habitually reckless or has a violent nature or disposition.

Because the Commonwealth has no written law on the question pertaining to parental civil liability for the negligent act of a minor, the trial court applied the Restatement (Second) of Torts principle pertaining to negligent entrustment. 7 CMC § 3401.

Restatement (Second) Torts, section 390, provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) Torts § 390.[3]

The important question we need to answer is whether Jeffrey was competent to drive his parents'

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[3] Restatement (Second) Torts, section 390 is a special application of section 308. Restatement (Second) of Torts § 390 cmt. b. Section 308 provides:

> It is negligence to permit a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) Torts § 308.

truck. We turn to the Commonwealth traffic laws regarding the licensing of persons operating motor vehicles on public highways.

Our traffic laws provide that no person may operate any motor vehicle in the Commonwealth "unless that person has been licensed as an operator under this division." 9 CMC § 2201. The Code also requires an examination of each driving applicant for eyesight, ability to read and understand traffic-control devices, knowledge of safe driving practices and of CNMI traffic laws, and an actual demonstration of the applicant's ability to operate a motor vehicle. 9 CMC § 2207. It notes that persons under the age of 16 are "unqualified" to hold an operator's permit. 9 CMC § 2203(a).

Our law requires that only persons who are competent to drive are licensed an allowed to drive on our public roadways. Because an automobile is a dangerous instrumentality in the hands of inexperienced, youthful, and unqualified drivers, such traffic laws are necessary for the safety of the public and must be strictly enforced. This is why the Commonwealth requires testing before licensing.

Other jurisdictions agree:

> The whole purpose of requiring drivers to possess licenses is to protect the public against the risks of permitting incompetent or inexperienced drivers to operate vehicles on the public thoroughfares.

Roland v. Golden Bay Chevrolet, 207 Cal.Rptr. 2413, 418 (Cal.Ct. App. 1984), *hr'g granted and dismissed as moot*, 217 Cal.Rptr. 415 (1985).

> Licensing is a means by which the state may determine whether vehicle operators have acquired a minimal standard of competence.

City of Spokane v. Port, 716 P.2d 945, 947 (Wash. Ct. App. 1986), *review denied*, 106 Wash.2d 1010 (1986).

One state jurisdiction has held that its state licensing laws constitute a declaration that minors under the licensing age are incompetent drivers who do not possess sufficient care and judgment to safely operate a motor vehicle on the highway. *Sedlacek v. Ahrens*, 530 P.2d 424, 426 (Mont. 1974). *See also Vince v. Wilson*, 561 A.2d 103 (Vt. 1989). In the case before us, the trial court concluded that Jeffrey's youth, lack of a license and inexperience as a qualified driver proximately caused the accident. We find no error with this finding.

In order to find Mr. and Mrs. Quitugua liable under section 390, Restatement of Torts, the trial court had to find that they knew or had reason to know of Jeffrey's incompetence to drive and that this incompetence was a proximate cause of the accident with Yoo. Although Mrs. Quitugua argues differently, the evidence supports the trial court's factual findings and conclusions.

Mrs. Quitugua testified that she knew Jeffrey did not have a driver's license and that she was "just taking a chance that [Jeffrey] might know how to drive." (Trial transcript "Tr." 148:9-11; 152:16-18.) She also testified that she gave Jeffrey permission to use the truck to run errands, knowing that he had no license to drive. (Tr. 146:4-13; 155:16-23; 57:20-58:3; 73:20-74:4; 79:12-80:7.) She was aware of Jeffrey's frequent use of the truck and tacitly approved it. Despite this knowledge, she and her

husband allowed him to use the car risking the possibility of an accident.

The trial court's conclusion that the Quituguas permitted Jeffrey to use the truck on the night of the accident knowing that he was unlicensed was correct. Implied permission may be deduced from the course of conduct and relationship between Jeffrey and his parents. *See Derusha v. Iowa Natl' Mut. Ins. Co,* 181 N.W. 2d 481, 485 (Wis. 1970); *See also Jones v. Fleischhacker,* 325 N.W.2d 633, 640 (Minn 1982). The evidence shows that the Quituguas had allowed Jeffrey to use the truck whenever Jeffrey decided to do so, including the night of the accident. Although there was no express permission, based on Jeffrey's unrestricted use of the truck, there was evidence of implied permission to do so. For example, Jeffrey testified that his sister Agnes taught him how to drive the family car in their driveway even though he was unlicensed. (Tr. 53:23-55:21.) Also, Jeffrey's friends testified that Jeffrey drove them to and from school and on weekends.[4] (ER 3 and ER 4.)

The trial court's conclusion that there is parental liability based on negligent entrustment is adequately supported by evidence of Mrs. Quitugua's actual knowledge that Jeffrey had no license to drive and implied permission given to Jeffrey to use the truck. The standard of review we apply is for clear error. Unless we are "convinced that a mistake" has been made in regard to

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[4] While this evidence was introduced apparently to show that he could drive, it fails to overcome the fact that he had no license to drive, was an inexperienced driver and should not have been driving on the night of the accident.

the trial court's factual findings, we must affirm. *Apatang v. Mundo*, No. 92-025 (N.M.I. Feb. 22, 1994). The factual findings upon which the court based its conclusion that there was negligent entrustment was not clearly erroneous. Had Jeffrey been licensed, he would have had the legal basis to drive and to operate his parents' truck.

We need not address the question of whether Mr. and Mrs. Quitugua are also liable for the negligent entrustment of the truck to Jeffrey because Jeffrey was intoxicated at the time of the accident. If, at the time of the accident, they knew that Jeffrey habitually consumed alcohol to the point of inebriation and took no precautionary measure to prevent Jeffrey from driving the truck, then these alleged facts would have been an additional basis of liability for negligent entrustment. Here, however, the evidence appears insufficient to establish these allegations. At most, the finding that Jeffrey was under the influence of alcohol at the time of the accident merely supports the trial court's conclusion that Jeffrey was not only an inexperienced driver, but an irresponsible one as well.

We therefore AFFIRM the Judgment of the trial court.

Dated at Saipan, MP, this 12th day of May, 1994.

/s/ Jose S. Dela Cruz
JOSE S. DELA CRUZ,
Chief Justice

/s/ Ramon G. Villagomez
RAMON G. VILLAGOMEZ,
Associate Justice

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS,
Special Judge

(2)

No. 94-1879

Supreme Court, U.S.
FILED
JUN 14 1995
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In The

Supreme Court of the United States

October Term, 1994

SYED WAHIDUL ISLAM and
MAHABUB ALAM BHUIYAN,

Petitioners,

v.

CREATIVE TOURS MICRONESIA, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in this negligent entrustment case arising under the law of the Commonwealth of the Northern Mariana Islands, the Ninth Circuit applied the proper standard of review in reversing the district court's conclusions concerning the existence and scope of the entrustor's duty of inquiry.

2. Whether the Ninth Circuit properly decided this case under the theory of negligent entrustment, which was the only theory pled and argued in the district court and the Ninth Circuit, rather than under another theory, such as negligent hiring, that was not raised in either the district court or the Ninth Circuit.

3. Whether, in this negligent entrustment case arising under the law of the Commonwealth of the Northern Mariana Islands, the majority of the Ninth Circuit panel correctly ruled that the entrustor of a vehicle had no initial, affirmative duty to inquire into the competence of the entrustee.

LIST OF PARTIES

Petitioners, Syed Wahidul Islam and Mahabub Alam Bhuiyan are individuals.

Respondent, Creative Tours Micronesia, Inc., is a corporation, and pursuant to Sup. Ct. R. 29.1, identifies the following entities that are related to Creative Tours, Inc., as parent corporations, subsidiaries, or affiliates: (1) Pacifico Creative Service, Inc., a Hawaii Corporation; (2) Jalpak Co., Ltd., a Japan Corporation; and, (3) Creative Resort Guam, Inc., a Guam Corporation.

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No. 94-1879

In The

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SYED WAHIDUL ISLAM and
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Petitioners,

v.

CREATIVE TOURS MICRONESIA, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a personal injury action arising out of a one car accident in the Commonwealth of the Northern Mariana Islands. *See* Findings of Fact, ¶ 20, Appendix to Petition at 13 ("App."). The Petitioners, Syed Wahidul Islam and Mahabub Alam Bhuiyan, were passengers in the car and were injured in the accident. *Id.* at ¶¶ 20-24, App. at 13. The car was owned by Respondent, Creative Tours Micronesia, Inc. ("Creative Tours"), *id.* at ¶ 17, App. at 12, and was driven by Mohammed Nazrul Islim (referred to as "Ronnie"), who was an employee of Creative Tours. *Id.* at ¶ 5, App. at 10. Ronnie did not have a

driver's license, *id.* at ¶ 11, App. at 11, and was driving Creative Tours' car while off-duty, contrary to the unwritten policy of Creative Tours. *Id.* at ¶ 4, App. at 10. The accident occurred after Ronnie and the Petitioners left a birthday party, *id.* at ¶¶ 18-21, App. at 12-13, and was the result of Ronnie's negligence. *Id.* at ¶ 22, App. at 13.

The Petitioners brought this diversity action against Creative Tours in the District Court for the Northern Mariana Islands, alleging Creative Tours was liable for their damages on the basis of *respondeat superior* and the negligent entrustment of the car to Ronnie. The *respondeat superior* cause of action was dismissed by the district court, *see* CR 46 (Order Granting Partial Summary Judgment, filed May 5, 1992), and the case proceeded to trial on the negligent entrustment claim. After a bench trial, the district court judge found for the Petitioners on the basis of negligent entrustment under Sections 308 and 390 of the *Restatement (Second) of Torts*. *See* Conclusions of Law, App. at 16-17. The district court concluded that Creative Tours had an affirmative duty, which it breached, to initially inquire about the experience, driving record, and qualifications of Ronnie. *Ibid.* Creative Tours appealed.

The majority of the panel of the Ninth Circuit Court of Appeals reversed the district court's judgment. The majority found that under the negligent entrustment cause of action, there was no initial affirmative duty to inquire into the competence of an entrustee. *See* Memorandum Opinion, App. at 4. Petitioners' subsequent petition for rehearing and suggestion for rehearing en banc was denied. *See* App. at 21. Not one judge of the Ninth Circuit requested a vote on the suggestion for rehearing en banc. *Ibid.*

SUMMARY OF THE ARGUMENT

1. This case presents no issue appropriate for this Court's exercise of its discretionary jurisdiction. The unpublished Memorandum Opinion deals with the duty of inquiry in a negligent entrustment case under the law of the Commonwealth of the Northern Mariana Islands. No federal law is implicated, and the panel did not depart from the usual course of judicial proceedings.

2. The majority of the panel properly applied the appropriate standard of review in negligence cases. Under this standard, the existence and extent of the standard of care is a question of law, reviewable *de novo*, while issues of breach and proximate cause are questions of fact, reviewable for clear error. The majority correctly applied this standard in reviewing and reversing the district court's conclusion concerning the duty of inquiry in this negligent entrustment case.

3. The Ninth Circuit properly decided the case under the negligent entrustment theory, which was the theory or cause of action pled, tried and argued in the district court and argued before the Ninth Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Is Not A Case Appropriate For This Court's Exercise Of Its Discretionary Jurisdiction.

This is not the type of case appropriate for this Court's exercise of its discretionary jurisdiction. *See* Sup.

Ct. R. 10.1. The Ninth Circuit's unpublished Memorandum Opinion in this diversity action concerns the standard of care in a negligent entrustment case under the law of the Commonwealth of the Northern Mariana Islands. The decision clearly does not implicate federal law.

Citing Rules 10.1(a) and 10.1(b) of the Rules of the Supreme Court of the United States, Petitioners argue that review is warranted because the Court of Appeals (1) so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and (2) decided a federal question in a way that conflicts with applicable decisions of this Court. Petn. at 2. Neither of these contentions is correct.

2. The Ninth Circuit Applied The Proper Standard Of Review.

The Petitioners assert that the majority of the Ninth Circuit panel failed to apply the proper standards in determining that the findings of the district court were clearly erroneous. *See* Petn. at 14-22. The majority, however, expressly articulated and applied the proper standard of review for negligence cases. Under this standard, the existence and extent of the standard of conduct are questions of law, reviewable *de novo*, while issues of breach and proximate cause are questions of fact, reviewable for clear error. *See* Memorandum Opinion, App. at 2.

The issue addressed by the Ninth Circuit was whether, under the law of the Commonwealth of the Northern Mariana Islands, an entrustor is under an initial, affirmative duty to inquire into the competence of

the entrustee. The majority of the panel held that there was no such duty, although once an entrustor does know facts which would cause a reasonable person to inquire further, it may be liable for failing to do so. *See* Memorandum Opinion, App. at 3-4.

Petitioners' argument that the Ninth Circuit failed to apply the correct standard of review is misplaced. The "clearly erroneous" standard of review, reflected in Rule 52(a) of the Federal Rules of Civil Procedure, does not apply to an appellate court's review of questions of law. As this Court has observed, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). In negligence cases, the Ninth Circuit follows the unremarkable rule that "[t]he existence and extent of the standard of conduct are questions of law, reviewable *de novo*," *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991), while "issues of breach and proximate cause are questions of fact, reviewable for clear error." *Ibid.* This is the standard applied by the majority of the panel in this case and is the standard usually applied by the Courts of Appeals. *See, e.g., Fulk v. Illinois Cent. R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994) (determination of any question of duty is a question of law), *cert. denied*, 115 S.Ct. 193, 130 L.Ed.2d 125, 63 USLW 3248 (1994); *McGonigal v. Gearhart Industries, Inc.*, 788 F.2d 321, 326 (5th Cir. 1986) ("Although it is clear that facts evincing negligence are to be submitted to a jury, the standard of care owed by a defendant to a plaintiff is a question of law"); *Fed. Exp.*

Corp. v. State of R.I. Dept. of Transp., 664 F.2d 830, 835 (1st Cir. 1981) ("The existence and extent of a duty of care are questions of law; whether any such duty has been breached and whether proximate cause exists are questions for the factfinder, whose determination is binding on appeal unless clearly erroneous"); *see also Restatement (Second) of Torts*, § 328B(b), (c) (in an action for negligence court determines whether facts give rise to any legal duty on part of defendant and the standard of conduct required of the defendant by the legal duty).

In this case the complaint charged Creative Tours with negligent entrustment and the Petitioners' argument, both in the district court and on appeal, was based on negligent entrustment. *See* Memorandum Opinion, App. at 4. The district court premised liability in this case on the negligent entrustment of the vehicle based on Creative Tours' breach of a duty to initially and affirmatively inquire about the experience, driving record, and qualifications of the entrustee. *See* Conclusions of Law, ¶¶ 7-11, App. at 17.

Properly relying on Sections 308 and 390 of the *Restatement (Second) of Torts*, the majority of the Ninth Circuit panel correctly held that under Commonwealth law "entrustors of chattels are under no initial, affirmative duty to inquire into the competence of their entrustees." Memorandum Opinion, App. at 3-4.[1] The majority also relied on the decision of the Commonwealth Supreme Court in *Yoo v. Quitugua*, Appeal No. 92-001 (N.M.I. May 12, 1994), *reprinted in* App. at 25-35, and cases from other

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[1] By Commonwealth statute, the *Restatement* provides the rules of decision for the Commonwealth courts. 7 CMC § 3401 (1984).

jurisdictions in arriving at its conclusion. *See* Memorandum Opinion, App. at 3-5.[2] Creative Tours, as an

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[2] In challenging this conclusion, Petitioners rely on the cases they relied on before the Ninth Circuit. In *Yoo v. Quitugua, supra,* the defendant mother had actual knowledge that her son lacked a driver's license. *See* App. at 32. *Seward v. Griffin,* 452 N.E.2d 558 (Ill. App. 1983), cited by Petitioners for the proposition that entrustment of a vehicle to an unlicensed driver is an independent act of negligence, *see* Petn. at 11, and *Owens v. Carmichael's U-Drive Autos,* 2 P.2d 580 (Cal. Ct. App. 1931), cited for the proposition that "the fact the driver was unlicensed makes for a prima facie case of negligent entrustment," *see* Petn. at 11, both involved the entrustment of a vehicle to a driver that the entrustor knew was unlicensed. *See Seward,* 452 N.E.2d at 563 (entrustor had actual knowledge that entrustee was unlicensed); *Owens,* 2 P.2d at 581 (entrustor knew that entrustee had no driver's license but possessed merely a temporary permit). The duty of inquiry was not an issue in either of these cases. Similarly, *Crockett v. United States,* 116 F.2d 646 (4th Cir. 1940), *cert. denied,* 314 U.S. 619 (1941), cited at page 13 of the Petition, was not a negligent entrustment case, the issue being whether the employee was acting within the authority granted to him by his employer so as to render the employee an agent or servant of the employer. *See* 116 F.2d at 651. The two Texas cases, *Williams v. Steves Industries, Inc.,* 699 S.W.2d 570 (Tex. 1985), and *Southwestern Bell Tel. Co. v. Davis,* 582 S.W.2d 191 (Tex. Ct. Civ. App. 1979), cited by Petitioners at 13 of the Petition are also distinguishable. Both involved accidents caused by the negligence of employees in the course and scope of employment in which the employers were liable on the basis of *respondeat superior.* In *Williams v. Steves Industries, Inc.* there are indications that the employer had knowledge that the employee did not have the requisite license for a heavy truck. The issue before each court was whether the acts of the employers were sufficiently grossly negligent so as to support an award of exemplary damages, and any comments concerning negligent entrustment were, in these cases, simply dicta. There is also no indication that they were decided under *Restatement* principles.

entrustor, was, therefore, under no affirmative duty to inquire into the entrustee's competence before entrusting him with a vehicle. Memorandum Opinion, App. at 4-6. The majority emphasized that the case was tried and argued on the basis of negligent entrustment and not negligent hiring, a different tort. Memorandum Opinion, App. at 4. "Whatever Creative Tours' duty might have been in employing Islim, it had no affirmative duty of inquiry, in its role as owner of the Toyota Corolla, prior to entrusting the car to Islim." *Ibid.* The majority carefully pointed out that nothing in its disposition " 'shields an employer from liability' for 'fail[ing] to inquire about an employee's license to drive,' " *ibid.* (quoting Dissent), and that "[e]mployers may or may not be liable under theories not at issue here." *Ibid.* The majority concluded that it was "simply apply[ing] to this car owner the same rule that applies to all other car owners." Memorandum Opinion, App. at 4-5. The issue of negligent hiring had not been presented to the district court or the Ninth Circuit and did not form the bases of their decisions.

The focus on negligent entrustment in this case was understandable given the fact that the accident occurred while the entrustee was driving from a birthday party, *see* Findings of Fact, ¶¶ 17-21, App. at 12-13, contrary to Creative Tours' unwritten policy limiting the use of vehicles to business purposes only, *id.*, ¶ 4, App. at 10, and clearly far removed from the scope of his employment.

With the basis for the district court's finding of negligence eliminated as a matter of law, the majority of the panel also rejected Petitioners' argument that the judgment could be affirmed "in any event," Memorandum Opinion, App. at 5, because the record contains sufficient

evidence to support the district court's finding that Creative Tours had reason to know of the entrustee's incompetence. *Ibid.* The majority analyzed each of the points advanced by Petitioners, in a list "notable for its utter unremarkableness," Memorandum Opinion, App. at 6, and correctly found that "[n]othing in the list offers any affirmative reason to suspect Ronnie could not drive competently." *Ibid.*

In conclusion, the panel applied the proper standard of review in reversing the judgment of the district court.

3. The Ninth Circuit Properly Decided The Case Under The Theory Of Negligent Entrustment.

Petitioners argue that the Ninth Circuit erred in deciding the case under the negligent entrustment theory or cause of action. *See* Petn. at 19-22. The case, however, was pled, tried, argued and decided as one of negligent entrustment. *See* Memorandum Opinion, App. at 4. The complaint alleged only two theories: negligent entrustment and *respondeat superior.* The *respondeat superior* claim was dismissed prior to trial, and the case proceeded to trial on the negligent entrustment theory.

Petitioners assert that the Ninth Circuit was incorrect in deciding the case on the basis of the negligent entrustment cause of action and not on the basis of an undefined, unpled, and unargued theory of "negligent hiring." Petitioners state that "[t]his device of dissecting the roles of an employer in order to avoid dealing with one of the key facts in the case is inconsistent with and contrary to procedural and substantive law." Petn. at 20. Petitioners note that the complaint alleged that Ronnie was an

employee and that Creative Tours negligently entrusted the car to him. Petn. at 20. They state that "[the] majority decision implies that had the plaintiffs used the word 'employee' instead of 'operator' in paragraph 9, then the decision might be different." *Ibid.*

The panel, however, did nothing of the sort. The majority adverted to the fact that Creative Tours was Ronnie's employer and concluded that under negligent entrustment, employer-entrustors are treated just like any other entrustor. Memorandum Opinion, App. at 5; *see also* App. at 4 ("Whatever Creative Tour's duty might have been in employing Islim, it had no affirmative duty of inquiry, in its role as owner of the Toyota Corolla, prior to entrusting the car to Islim"). The duty that was tried and argued was the duty of an owner of a chattel.

The entire case was presented on a negligent entrustment theory, not on a negligent hiring theory. This was the view of the district court, which decided the case on the basis of negligent entrustment. The arguments presented by the parties before the district court and the Ninth Circuit were based on negligent entrustment, and both the majority and dissenting opinions viewed the issue as one of negligent entrustment. *See* Memorandum Opinion, App. at 4 ("Islam's complaint charged Creative Tours with negligently entrusting an automobile to Ronnie Islim, not with negligently hiring him, and his argument, both in the district court and on appeal, was based on negligent entrustment"). Creative Tours has never conceded nor did the Ninth Circuit hold that liability could be imposed under a different theory or cause of

action, such as negligent hiring.[3] The issue was not raised, tried or argued.

Petitioners assert that the majority's decision "rests on a theory that: (1) was never briefed or argued by either party, (2) is contrary to the letter and spirit of the Federal Rules of Civil Procedure, and (3) ignores facts that were uncontradicted at trial and part of the findings and conclusions." Petn. at 22. This statement is difficult to understand, since the case was decided on the one theory that was briefed and argued: negligent entrustment. Petitioners' references to cases regarding the pleading of causes of action, *see* Petn. at 20-21, are inapposite, since an alternative theory or cause of action was not presented to the district court or to the Ninth Circuit.

Even in the Petition for Writ of Certiorari, Petitioners' argument is firmly couched in terms of negligent entrustment. While alluding to the tort of negligent hiring, *see, e.g.*, Petn. at i, "Questions Presented For Review" ("Whether the circuit court erred in basing its decision on the conclusion that plaintiffs pled a theory of negligent entrustment as distinguished from negligent hiring"), the Petitioners have not presented this Court, and did not present the Ninth Circuit, with an argument setting forth the basis, the elements, and the applicability of this separate theory or cause of action. In short, the Petitioners have not delineated the separate tort theory which they now generally argue the Ninth Circuit should have considered. The liberal rules of pleading do not

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[3] The majority merely pointed out that "[e]mployers *may* or *may not* be liable under theories not at issue here." Memorandum Opinion, App. at 4 (emphasis added).

permit plaintiffs to wait until the last minute to refine the theories on which they intend to build their case where this would unfairly surprise defendants. *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991).

In this case it is clear that Creative Tours built and premised its defense and appeal on the proposition that under the negligent entrustment theory it was not liable to Petitioners in the absence of actual knowledge of Ronnie's incompetence and that it had no initial, affirmative duty to inquire into Ronnie's qualifications under the negligent entrustment theory. This was the focus of Creative Tours' appeal, it was the focus of Petitioners' arguments before the court of appeals, and it was the basis on which the court of appeals decided the case. The Petitioners did not move to amend their complaint, and since the "negligent employment" theory was not tried by either express or implied consent, and there was no briefing or evidence at trial concerning this theory, Petitioners' references to Rule 15(b) of the Federal Rules of Civil Procedure at page 21 of their Petition are inapposite. *Campbell v. Trustees of Leland Stanford Junior University*, 817 F.2d 499, 596 (9th Cir. 1987).

Had the issue of employer's liability been litigated, the defense in the case would probably have been significantly different. Petitioners, for example, emphasize the Commonwealth's hiring statutes. *See* Petn. at 17-19. As pointed out by the majority of the panel, the fact that there was no employment contract did not put Creative Tours on notice of anything about the entrustee's driving ability when it entrusted the vehicle to him. Petitioners now claim in their Petition that Creative Tours should be liable because it failed to comply with the hiring statutes.

However, since this issue was irrelevant to a negligent entrustment claim, the record is silent as to what information would have actually been required by the government, and specifically what would have been required with respect to a person hired "to meet tour groups to assist with baggage and check-in at the airport and at the several hotels in Saipan where the tourists stayed." Findings of Fact, ¶ 5, App. at 10. Those facts would have been developed at trial if a negligent employment theory had been pled and tried. Since that issue was neither pled nor tried, the facts developed at trial did not go to this issue, and it would have been improper to impose liability on a theory that Creative Tours did not have the opportunity to defend against in the trial court or the Ninth Circuit.[4]

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[4] Petitioners' discussion of the Commonwealth of the Northern Mariana Islands' immigration requirements implicitly speculates that had the job application been submitted it would have contained information regarding the entrustee's driving abilities. *See* Petn. at 17-18. The requirements of the immigration authorities, however, were not introduced into evidence by the Petitioners. There was simply no evidence introduced on this issue. With respect to compliance with the certification process, it was indicated at trial that Ronnie was involved in a wage dispute and that the Attorney General was requesting assistance in placing people, such as Ronnie, in jobs so that they could remain in the Commonwealth to testify. It was under this situation that Ronnie approached Creative Tours for a job, and it was Creative Tours' understanding that the job certification process need not be satisfied because of Ronnie's pending litigation. *See* Trial Transcript at 209 (Testimony of Kentaro Nezu); *id.* at 12 (Testimony of Joaquin Sablan).

The complaint in this case was based on allegations of negligent entrustment, governed by Sections 308 and 390 of the *Restatement (Second) of Torts*. This was the legal theory that persisted through trial and the appeal of this matter, and the panel appropriately based its decision on this theory. The theory perseveres in the Petition, which, although mentioning negligent hiring (without defining the tort), is actually based on negligent entrustment arguments that were rejected by the majority of the Ninth Circuit panel.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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